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No. 90-758

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAVID ENIX, JAMES MEHAFFIE, DAVID MEHAFFIE, DOUGLAS SAPP, KYM MEHAFFIE and H.F. PERKINS,
Petitioners,

v.

THE DAYTON WOMEN'S HEALTH CENTER, INC., K. W. DAVIS, MD, and ROBERT SKIPTON, MD,
Respondents.

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED

1. Whether a permanent injunction based upon the content of the speech and not narrowly tailored to serve a compelling state interest may prohibit peaceful assembly and picketing on a public sidewalk.

2. Whether a permanent injunction may bind persons who have not engaged in any tortious activities, have not acted in concert with named defendants, have not received notice and have had no opportunity to be heard.

LIST OF PARTIES

The parties to the proceedings below were the petitioners David Enix, James Mehaffie, David Mehaffie, Douglas Sapp, Kym Mehaffie and H.F. Perkins.

The Respondents before this Court include The Dayton Women's Health Center, Inc., K.W. Davis, MD, and Robert Skipton, MD.

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REPLY TO BRIEF IN OPPOSITION

I

The Respondents' brief relies on facts not found in the record of the lower courts.

The Respondents' brief is based on allegations never accepted as fact by the lower courts. Despite the Respondents' claims of horrific conduct on the part of the Petitioners, the only tortious conduct noted by the trial court was trespass. The other findings dealt with driveway obstruction and traffic interference. *Dayton Women's Health Center v. Enix*, 86-3120, (C.P. Montgomery Co., Ohio, 1987), pages 5-6.

The trial court's findings are put into perspective by the language of the injunction and by the record itself. For example, according to the trial court, interference with traffic on South Dixie Drive stemmed from sidewalk picketers' signs directed toward motorists. The injunction prohibits display of such signs. *Dayton Women's Health Center v. Enix*, 36-3120, (C.P. Montgomery Co., Ohio, 1987), pages 6-7.

The Respondents rely heavily on allegations of conduct which they alone ascribe to the Petitioners. For example, they state that a bomb threat was phoned in to the clinic. The trial court at no time connected this incident with the Petitioners; the "bomb threat" occurred one and one-half years before Petitioners ever began to picket the Dayton Women's Health Center (DWHC). The majority of the Respondents' so-called "facts" are likewise refuted. The Respondents continue to make facts the issue in this case. They are not. The issues in this case are questions of law. Under the law as expounded by this Court, no set of facts can justify a content-based injunction of innocent non-parties.

Respondents claim that the Petitioners coordinate all the picketing at the DWHC. This is simply not true. The claim assumes that Petitioners control the hundreds of thousands of people in the Dayton area who are opposed to abortion. The Petitioners do not know who "all individuals protesting" abortion are and have no connection with them whatsoever. Such a group is not even a legal entity, yet the injunction purports to bind everyone.

II

The cases cited by the Respondents do not support the injunction as a content-neutral time, place and manner restriction

Respondents cite *Cox v. Louisiana*, 379 U.S. 536, 13 L.Ed. 2d 471, 85 S.Ct. 453 (1965) and *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 69 L.Ed. 2d 298, 101 S.Ct. 2559 (1981), maintaining that the First Amendment does not provide for unlimited expression. There are instances where speech is subject to certain neutral limitations, but this Court has declared on innumerable "occasions" that the First Amendment preeminently protects peaceful dissent in the public square. The Petitioners seek not unlimited freedom but rather the right to peacefully speak out in the public square without the threat of arrest and legal sanction.

The Respondents maintain, and Petitioners agree, that First Amendment speech and assembly are subject to neutral time, place and manner restrictions. They extend that rule of law to include this injunction, claiming that it "places reasonable restrictions on the speaker without effecting [*sic*] the content of their speech." But the

injunction *does* affect the content of their speech. It restricts only those speakers who engage in a particular category of speech--speech protesting abortion. No speech critical of abortion may take place on the public easement across the street from the clinic, on the public sidewalk north or south of the DWHC, or on any private property within view of the DWHC. Even if the injunction involved otherwise reasonable time, place or manner restrictions, when they are applied *exclusively* to those "protesting the activities conducted at the Dayton Women's Health Center" they become content-based prohibitions. Content-based restrictions, reasonable or otherwise, call for a much stricter level of judicial scrutiny and must be justified by a compelling state interest. *Boos v. Barry*, 485 U.S. 312, 99 L.Ed. 2d 333, 108 S.Ct. 1152 (1988). The Respondents consistently refuse to address this issue.

Only one case cited by the Respondents, *Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d 57, 556 N.E. 2d 157 (1990), dealt with a defendant class action. *Planned Parenthood* did not address the propriety of an injunction against the class. The other cases cited by

Respondents dealt only with named defendants, not a class. None of the cases upheld restrictions against individuals based on their expressing a viewpoint against abortion such as the injunction challenged here. This is not a reasonable time, place or manner restriction. This is viewpoint discrimination. *See*, *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 87 L.Ed. 2d 567, 105 S.Ct. 3439 (1985) (government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.)

Respondents urge that courts may freely restrict the peaceful expression of all members of a broad defendant class because some class members have engaged in tortious conduct. Courts may enjoin tortious acts by those who have engaged in them. They may not enjoin those who have not. And they may not extend the injunction to include innocent persons and non-parties with little or no connection to those engaged in past unlawful acts. This is the clear ruling of this Court in *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 89 L.Ed. 2d 661, 85 S.Ct. 478 (1945), *NAACP v. Claiborne Hardware*, 458

U.S. 886, 73 L.Ed. 2d 1215, 102 S.Ct. 3409 (1982), *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 78 L.Ed. 894, 54 S.Ct. 475 (1934) and others as cited in Petitioner's application for the Writ. Respondents cannot justify the challenged injunction in light of these clear holdings. They cite no case, as there are none, which suggests that courts have the power to bind non-parties who act independently of named defendants.

III

The cases cited by the Respondents do not support the assertion that there is a government interest at stake which justifies the challenged injunction.

The Respondents maintain that "significant government interests" outweigh the Petitioners' rights to peaceful assembly and protest. The first asserted interest is that of "keeping streets and sidewalks open . . . and in protecting the safety and convenience of persons using public and private facilities."[1] Under the guise of keeping

1 It is odd that Respondents would assert this government interest. Responding to questions at the trial, Anita Wilson, the Director of the DWHC, testified:

Q. You don't have any complaint, I gather, with them as long as they stay on the sidewalk?

the sidewalks conveniently open the Respondents would close them to free speech. They attempt to support this notion with *Heffron* and *Cox v. Louisiana*, both *supra*, as well as *Cox v. New Hampshire*, 312 U.S. 569, 85 L.Ed. 1049, 61 S.Ct. 762 (1949). But the government interest asserted in *Cox v. Louisiana* was the protection of the integrity of the judicial process in the face of public protest. Both *Heffron* and *Cox v. New Hampshire* dealt with content-neutral restrictions on speech. Unlike the injunction here, a neutral restriction protecting traffic flow would limit all picketers in front of the DWHC to ten, not just those protesting abortion. If the injunction were content-neutral then no picketers would be allowed across the street from the clinic; but in that location the injunction forbids only pro-life picketing. The Respondents also cite *U.S. v. Grace*, 461 U.S. 171, 75

A. As long as it is peaceful quiet picketing on the sidewalk.

Q. Okay. So, those are the things that you, in your mind have asked this court to determine, but I'm asking you as far at the sidewalk usage, you are not complaining that there is too much crowding or that people can't walk. I'm not hearing any of that from you, right?

A. Correct.

Trial Transcript at 90.

L.Ed. 2d 736, 103 S.Ct. 1702 (1983), proposing that First Amendment rights may not be exercised by persons "whenever, however and wherever they please." In *Grace*, however, a restriction of free speech on the public sidewalk, much like the injunction here, was struck down, not upheld. If *Grace* stands for anything, it stands for the proposition that courts may not arbitrarily forbid free speech on public sidewalks.

Respondents also assert that the privacy rights of the patients and staff of the DWHC are paramount to the Petitioners' rights to free speech. They cite *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed. 2d 64 (1977), *Nyberg v. Virginia*, 495 F. 2d 1342 (8th Circ.), *cert. denied*, 419 U.S. 891, 95 S.Ct. 169, 42 L.Ed. 2d 136 (1974), and *American College of Obstetricians and Gynecologists v. Thornburgh*, 613 F.Supp. 656, 666 (E.D. Pa, 1985) to support this position. In each of these cases, however, the privacy right was asserted against the *state*, never against a private citizen. The right to privacy announced in the *Roe v. Wade*, 410 U.S. 113, 35 L.Ed. 2d 147, 93 S.Ct. 705, *reh. den.* 410 U.S. 959 (1973) line of cases is claimed by the individual against the *government*. It is not claimed by the

individual against other private citizens. This Court has never formulated a privacy right protecting the individual in the public forum from being exposed to views with which they disagree. *See e.g., Chaplinsky v. New Hampshire*, 315 U.S 568, 86 L.Ed. 1031, 62 S.Ct. 766 (1942) and *Cohen v. California*, 403 U.S. 15, 29 L.Ed. 2d 284, 91 S.Ct. 1780 (1971). If the First Amendment protects the right of an individual to say "F--k the draft" inside a county courthouse it certainly protects an individual's right to say "Save your Baby" on a public sidewalk.

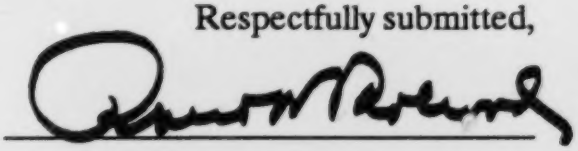
No right of privacy is protected by an injunction which allows ten persons to protest on the public sidewalk but not eleven. The Respondents cannot seriously contend that privacy rights are protected by allowing picketers in front of the clinic, but forbidding them across the street from the same building, or by allowing them on the sidewalk in front of DWHC, but not on the sidewalk farther away. This Court has not at any time ruled that a privacy right can justify content-based prohibitions of free speech in the public forum. Such a theory turns the constitution upside down, restricting the very thing the

First Amendment was designed to protect: public discourse on a matter of public interest.

CONCLUSION

The Brief in Opposition relies on facts not found in the record in this case. It does not address this Court's precedents regarding content-based restrictions of free speech in the public forum. The Respondents do not properly construe the right of privacy as delineated by this Court. Finally, no explanation is offered why an injunction can issue against innocent non-parties, acting independently of named defendants, who only wish to engage in constitutionally protected activity. For the foregoing reasons the petition should be granted.

Respectfully submitted,



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